St. John's Law Review

Volume 57
Number 4 *Volume 57, Summer 1983, Number 4*

Article 13

July 2012

Search Warrant May Be Issued to Compel a Suspect to Supply a Blood Sample Prior to Arrest Provided Probable Cause Exists and There Is Both a Clear Indication that Relevant Material Evidence Will Be Found and a Safe, Reliable Means of Obtaining the Sample

Michael J. Gunnison

refuse to accept an unindorsed item, or supply the proper indorsement if the bank accepts the instrument.[161] Not only are bank tellers aware of the intended transaction,[162] but it is also common banking practice to instruct tellers to request indorsements before accepting any instrument.[163]

Although the First Circuit in *Bowling Green* doubted whether a bank's holder in due course status should depend upon "whether a clerk employed the appropriate stamp,"[164] *Marine Midland's* persuasive answer would be that it is hardly inequitable "to penalize the bank when it fails to perform such a simple act."[165]

Donna M. Morello

DEVELOPMENTS IN NEW YORK LAW

Search warrant may be issued to compel a suspect to supply a blood sample prior to arrest, provided probable cause exists and there is both a clear indication that relevant material evidence will be found and a safe, reliable means of obtaining the sample

The propriety of seizing physical or nontestimonial evidence from suspects in criminal investigations is an issue having substantial constitutional implications.[166] Indeed, the fourth amendment

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bank liable to drawer for loss resulting from payment inconsistent with restrictive indorsement).

[161] *See* 57 N.Y.2d at 227-28, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569.

[162] It is clear that the teller involved in the *Marine Midland* case, by taking the checks for the express purpose of transferring them to another bank, was conscious of the special nature of the transaction. Thus, it is submitted that it would not have been unduly burdensome on the bank for the teller to provide an indorsement reflecting the special nature of the transaction.

[163] *See* D. GERMAN & J. GERMAN, THE BANK TELLER'S HANDBOOK: HOW TO BUILD YOUR BANKABILITY 134 (rev. ed. 1980) (teller is responsible for proper indorsement of every check); T. QUINN, QUINN'S UCC COMMENTARY AND LAW DIGEST § 4-205[A], at S4-25 (Supp. 1982) ("the teller's first instinct [to get indorsements] is the only safe rule"); Bell, *The Depositary Bank as a Holder in Due Course: A Case Study*, 8 IDAHO L. REV. 1, 30 n.122 ("tellers always make you indorse, whether needed for negotiation or not").

[164] *Bowling Green*, 425 F.2d at 84.

[165] 57 N.Y.2d at 228, 441 N.E.2d at 1087, 455 N.Y.S.2d at 569 (quoting B. CLARK & A. SQUILLANTE, *supra* note 148, at 189).

[166] *See, e.g.*, Davis v. Mississippi, 394 U.S. 721, 726-27 (1969); United States v. Harris, 453 F.2d 1317, 1323 (8th Cir. 1972), *cert. denied*, 412 U.S. 927 (1973). The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

of the Federal Constitution requires judicial balancing of the individual's right to privacy against the state's interest in enforcing its criminal laws.[167] Thus, New York courts have weighed relevant factual circumstances in determining whether a suspect's implication in a criminal investigation is sufficiently strong to warrant the prearrest acquisition of nontestimonial evidence from him.[168] Recently, in *In re Abe A.*,[169] the Court of Appeals held that a suspect in a homicide investigation may be compelled by court order to supply a blood sample prior to his arrest, provided it is shown that probable cause exists to believe the suspect has committed the crime, there is a clear indication that the sample constitutes relevant material evidence, and there is a safe, reliable means of obtaining the specimen.[170]

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shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The states, by virtue of the fourteenth amendment, must respect the admonitions of the fourth amendment. Mapp v. Ohio, 367 U.S. 643, 650-60 (1961); *see* Ker v. California, 374 U.S. 23, 30 (1963). Furthermore, the fourth amendment has been held applicable to both the investigatory and accusatory stages of criminal law enforcement proceedings. *Davis*, 394 U.S. at 726; Merola v. Fico, 81 Misc. 2d 206, 207, 365 N.Y.S.2d 743, 745 (Sup. Ct. Bronx County 1975). It should be noted, however, that while actions amounting to less than an arrest may entail a restraint of liberty sufficient to constitute a seizure under the fourth amendment, Cupp v. Murphy, 412 U.S. 291, 294 (1973); Terry v. Ohio, 392 U.S. 1, 19 (1968); People v. Peters, 18 N.Y.2d 238, 244, 219 N.E.2d 595, 598-99, 273 N.Y.S.2d 217, 222 (1966), *aff'd sub nom.* Sibron v. New York, 392 U.S. 40 (1968), not all restraints of liberty based upon a lack of probable cause violate the fourth amendment, *Terry*, 392 U.S. at 24-27; People v. Rivera, 14 N.Y.2d 441, 447, 201 N.E.2d 32, 36, 252 N.Y.S.2d 458, 463-64 (1964), *cert. denied*, 379 U.S. 978 (1965).

[167] Camara v. San Francisco, 387 U.S. 523, 534-35 (1966); Breithaupt v. Abram, 352 U.S. 432, 439 (1957). One test employed to determine the constitutionality of a prearrest seizure is "whether the particular intrusion is reasonable when based on all the known facts and legitimate law enforcement interests." Wise v. Murphy, 275 A.2d 205, 208 (D.C. 1971); *see* 1 W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 1 (2d ed. 1982); LaFave, *"Street Encounters" and the Constitution*: Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 40, 51-55 (1968).

[168] *See, e.g., In re* Alphonse C., 50 App. Div. 2d 97, 99, 376 N.Y.S.2d 126, 128 (1st Dep't 1975) (order for suspect to appear in lineup will not issue absent showing of probable cause); District Attorney v. Angelo G., 48 App. Div. 2d 576, 579-80, 371 N.Y.S.2d 127, 130-31 (2d Dep't 1975) (order to obtain handwriting exemplars will issue upon showing of probable cause); People v. McClain, 88 Misc. 2d 693, 694, 389 N.Y.S.2d 976, 976 (Sup. Ct. Kings County 1976) (suspect may be ordered to appear in lineup once probable cause is demonstrated); People v. Mineo, 85 Misc. 2d 919, 924-25, 381 N.Y.S.2d 179, 183-84 (Sup. Ct. Queens County 1976) (order to obtain palmprints of suspect will issue upon showing of probable cause).

[169] 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982).

[170] *Id.* at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7.

On January 16, 1980, Abe A.[171] was found bludgeoned to death in his apartment, after police were notified by Jon L. that the deceased, his business partner, had failed to keep an appointment with him that morning.[172] Blood was splattered throughout the apartment in what appeared to have been a violent struggle, and several of the deceased's teeth were found on the apartment floor.[173] There was no evidence that a forced entry had taken place.[174] A detective at the scene noticed that Jon L. bore several marks and bruises, suggesting that he had taken part in a struggle similar to that which preceded Abe A.'s death.[175] Jon L. explained that his injuries were sustained in a robbery attempt the previous day, an explanation which defied corroboration despite extensive police efforts to locate witnesses.[176] Upon discovering that the blood found in the apartment was of two types, one a common type matching that of the deceased, and the other a rare type possessed by less than one percent of the population, the District Attorney asked Jon L. to voluntarily submit to a blood analysis.[177] Jon L. refused this request, whereupon the District Attorney moved in Supreme Court, New York County, for an order requir-

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[171] Anonyms were used at all procedural levels in order to preserve the confidentiality of the parties' identities. *Id.* at 291 n.1, 437 N.E.2d at 266 n.1, 452 N.Y.S.2d at 7 n.1.

[172] *Id.* at 291-92, 437 N.E.2d at 266-67, 452 N.Y.S.2d at 8. Abe A. was last seen by a garage attendant parking his car on the evening of January 15, 1980. *Id.* at 291, 437 N.E.2d at 267, 452 N.Y.S.2d at 8. After the deceased failed to keep his appointment, Jon L. allegedly attempted to contact the deceased by telephone, and after receiving no answer, contacted the son-in-law of the deceased. *In re* Abe A., 81 App. Div. 2d 362, 363, 440 N.Y.S.2d 928, 928 (1st Dep't 1981), *rev'd*, 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982). Subsequent to the son-in-law's arrival at Jon L.'s office, the police were notified and asked to examine the deceased's apartment. 81 App. Div. 2d at 363, 440 N.Y.S.2d at 928.

[173] 81 App. Div. 2d at 363, 440 N.Y.S.2d at 928. It was determined that death had been caused by multiple lacerations of the scalp, contusions of the face, and fractures of the larynx. *Id.*

[174] 56 N.Y.2d at 291, 437 N.E.2d at 267, 452 N.Y.S.2d at 8.

[175] *Id.* at 292, 437 N.E.2d at 267, 452 N.Y.S.2d at 8. Jon L. had abrasions on his face, and both his hands were bruised and swollen. *Id.* One hand bore teeth marks as well. *Id.*

[176] *Id.* According to Jon L., the robbery took place in the Chambers Street subway station at 4:30 p.m. on January 15, 1980, at which time an unidentified man attempted to steal his watch. 81 App. Div. 2d at 363, 440 N.Y.S.2d at 929. A struggle followed, in which the attacker allegedly bit the hand of Jon L., who then lost consciousness for approximately 1 hour. *Id.* Neither the watch nor any other property was stolen, and the attack went unreported. *Id.* Despite Jon L.'s allegation that the assault took place during the evening rush hour, neither the transit policeman on duty, nor any of the passengers surveyed who were in the station at that time, could corroborate his story. 56 N.Y.2d at 292, 437 N.E.2d at 267, 452 N.Y.S.2d at 8.

[177] 56 N.Y.2d at 292, 437 N.E.2d at 267, 452 N.Y.S.2d at 8.

ing the suspect to submit to the test.[178] The court, at criminal term, granted the motion upon a finding that there was probable cause to believe that the deceased was murdered by Jon L.[179] Upon his refusal to comply with the order, Jon L. was pronounced guilty of criminal contempt.[180] On appeal, the contempt conviction was reversed and the order compelling production of a blood sample was dismissed by a divided appellate division, which held that the fourth amendment prohibits the prearrest, forced extraction of a blood sample from a suspect against whom no charges have been brought.[181]

The Court of Appeals, in a unanimous decision,[182] reversed the ruling of the appellate division and reinstated the orders of the criminal term, holding that an order authorizing an intrusion upon a person who has not been formally charged with the commission of a crime may issue upon a showing of probable cause, provided there is both a safe, reliable means of obtaining the sample and a clear indication that relevant material evidence will be found.[183] Furthermore, stated the Court, before issuing such an order, a

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[178] *Id.* Notice of the order was given to Jon L., *id.*, who objected to the order on the grounds that no charge had been brought against him, and that no subpoena had been issued to require his appearance before a grand jury, 81 App. Div. 2d at 364, 440 N.Y.S.2d at 929.

[179] 56 N.Y.2d at 292, 437 N.E.2d at 267, 452 N.Y.S.2d at 8. In granting the District Attorney's motion for a court order, the court pointed to the clearly probative nature of the evidence sought, and the relatively slight inconvenience which the test would require. *Id.* The order provided that the least amount of blood necessary for the test be drawn by a physician at Bellevue Hospital in a manner least likely to cause pain or trauma. *Id.* The order further required a police detective to be present at the place where the sample was to be withdrawn, and to transport the sample for analysis to the New York City Medical Examiner's Office, where the file eventually would be sealed. *Id.* at 293, 437 N.E.2d at 267, 452 N.Y.S.2d at 8.

[180] *Id.* at 293, 437 N.E.2d at 267, 452 N.Y.S.2d at 8-9. Jon L. was ordered imprisoned for 30 days, but execution of the order was stayed pending appeal. *Id.*

[181] 81 App. Div. 2d at 367-69, 440 N.Y.S.2d at 930-32. The court rejected the view that the Supreme Court's determination in Cupp v. Murphy, 412 U.S. 291, 295 (1973) (taking of scrapings from suspect's fingernails not violative of fourth amendment), and Schmerber v. California, 384 U.S. 757, 771 (1966) (blood test for alcohol over suspect's objections did not violate his constitutional rights) supported the validity of the order compelling Jon L. to supply a blood sample, since, in contrast to the present set of facts, the evidence in those cases would have been lost permanently had it not been obtained swiftly. 81 App. Div. 2d at 368, 440 N.Y.S.2d at 931. Furthermore, the court questioned the authority of the supreme court to issue the order, noting that no section of the CPL specifically authorizes the taking of a blood sample from a suspect prior to arrest. *Id.* at 366, 440 N.Y.S.2d at 930.

[182] Judge Fuchsberg wrote the opinion for the Court. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, and Meyer concurred. Judge Gabrielli concurred in result only.

[183] 56 N.Y.2d at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7.

court must weigh the gravity of the particular offense, the potential utility of the evidence sought, and the availability of less intrusive means of obtaining the evidence against the constitutional right to be free from bodily intrusions.[184] Addressing the question of whether a court has authority to require a prearrest blood sample, Judge Fuchsberg concluded that sections 690.05(2)[185] and 690.10(4)[186] of the Criminal Procedure Law (CPL), provide such authority in that they authorize a search of a designated person in order to seize specified property.[187]

In analyzing the validity of an order compelling the extraction of blood from a suspect prior to arrest, the Court, it is suggested, properly recognized that the initial inquiry is necessarily whether the CPL provides a statutory basis for such an order.[188] While the Court found that the aforementioned sections of the CPL supplied the requisite statutory basis, it is submitted that the Court erroneously neglected to address the issue of whether a blood sample constitutes "personal property" within the meaning of section 690.10.[189]

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[184] *Id.*

[185] CPL § 690.05(2) (1971 & McKinney Supp. 1981-1982).

[186] *Id.* § 690.10(4) (1971).

[187] 56 N.Y.2d at 294, 437 N.E.2d at 268, 452 N.Y.S.2d at 9. In contrast to the opinion of the appellate division, which was based upon a finding that no section of the CPL authorizes the taking of a blood sample from a suspect prior to arrest, *see supra* note 181, the Court of Appeals approved the criminal term's use of a court order to compel a blood extraction, reasoning that "equivalent judicial authority may be exercised under a court's power to issue a search warrant . . . ." 56 N.Y.2d at 294, 437 N.E.2d at 268, 452 N.Y.S.2d at 9 (citation omitted).

[188] 56 N.Y.2d at 293, 437 N.E.2d at 268, 452 N.Y.S.2d at 9. Although court orders compelling the extraction of blood implicate fourth amendment principles, the Court of Appeals correctly directed initial attention to the statutory basis of the order, since the determination of constitutional issues should be avoided whenever another ground upon which to base a decision is available. Communist Party v. Catherwood, 367 U.S. 389, 392 (1961); Markel v. Blum, 509 F. Supp. 942, 949 (N.D.N.Y. 1981); St. Clair v. Yonkers Raceway, Inc., 13 N.Y.2d 72, 76, 192 N.E.2d 15, 15-16, 242 N.Y.S.2d 43, 44 (1963), *cert. denied*, 375 U.S. 970 (1964); *In re* Dora P., 68 App. Div. 2d 719, 729, 418 N.Y.S.2d 597, 603 (1st Dep't 1979); Keogh v. Wagner, 20 App. Div. 2d 380, 386, 247 N.Y.S.2d 269, 274 (1st Dep't), *aff'd*, 15 N.Y.2d 569, 203 N.E.2d 298, 254 N.Y.S.2d 883 (1964); N.Y. STATUTES § 150 (McKinney 1971). Judicial reluctance to decide issues which are avoidable may be overcome, however, when a case presents an important constitutional issue which is likely to be brought before the court again. Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 19, 300 N.E.2d 710, 713, 347 N.Y.S.2d 170, 174 (1973); Phelan v. City of Buffalo, 54 App. Div. 2d 262, 265-66, 388 N.Y.S.2d 469, 472 (4th Dep't 1976).

[189] *See* CPL § 690.10 (1971). Section 690.10 provides: "*Personal property* is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it . . . . [c]onstitutes evidence or tends to demonstrate that an offense was committed or that a

Turning to fourth amendment considerations, the *Abe* Court, in establishing a three-part test for determining the legality of a prearrest, forced extraction of a blood sample,[190] relied primarily upon the Supreme Court's decisions in *Cupp v. Murphy*[191] and *Schmerber v. California*.[192] While the Court's test concededly provides adequate safeguards,[193] it nonetheless is submitted that the Court failed to analyze properly the rationale employed in those cases. In both *Cupp* and *Schmerber*, the Supreme Court sanctioned a warrantless search for incriminating evidence, recognizing

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particular person participated in the commission of an offense." *Id.* (emphasis added). In People v. Katz, 102 Misc. 2d 755, 757, 424 N.Y.S.2d 659, 660 (Civ. Ct. Nassau County), *rev'd*, 112 Misc. 2d 59, 448 N.Y.S.2d 85 (Sup. Ct. App. T. 1980), the issue before the lower court was whether a warrant could issue, pursuant to section 690.10, in order to obtain intangible visual evidence. 102 Misc. 2d at 757, 424 N.Y.S.2d at 660. In deciding whether such evidence could be acquired, the court directly confronted the question whether the particular evidence constituted "personal property" within the meaning of the statute. *Id.* The *Abe A.* Court made no such inquiry, but instead chose to analogize the case to a situation in which a warrant was issued authorizing the seizure of intangible evidence. *See* 56 N.Y.2d at 294, 437 N.E.2d at 268, 452 N.Y.S.2d at 9; People v. Teicher, 52 N.Y.2d 638, 651-52, 422 N.E.2d 506, 512-13, 439 N.Y.S.2d 846, 852-53 (1981). In *Teicher*, the Court held that section 690.10 of the CPL authorizes the issuance of a warrant to obtain video images. 52 N.Y.2d at 651-52, 422 N.E.2d at 512-13, 439 N.Y.S.2d at 852-53. Moreover, the *Abe A.* Court failed to consider that a prearrest extraction of blood by warrant may border on pretrial discovery. 56 N.Y.2d at 294, 437 N.E.2d at 268, 452 N.Y.S.2d at 9; *see also* District Attorney v. Angelo G., 48 App. Div. 2d 576, 581, 371 N.Y.S.2d 127, 132 (2d Dep't 1975) (Martuscello, J., dissenting). In *Angelo G.*, Justice Martuscello stated that there was no statutory authority to order a suspect to provide handwriting exemplars prior to arrest. *Id.* (Martuscello, J., dissenting). Thus, Justice Martuscello concluded that such an order was in reality "a mode of pretrial discovery not authorized by statute." *Id.* (Martuscello, J., dissenting).

[190] *See supra* notes 183-84 and accompanying text.

[191] 412 U.S. 291 (1973). In *Cupp*, the Supreme Court concluded that a suspect's constitutional rights were not violated by the taking of fingernail scrapings without a warrant during a prearrest interrogation regarding the strangulation of the suspect's wife. *Id.* at 296. This determination was based upon the Court's findings that the police had probable cause to arrest the suspect, *id.* at 293, and that the evidence had to be seized immediately if it was to be found at all, *id.* at 296.

[192] 384 U.S. 757 (1966). In *Schmerber*, the Court held that a seizure of a blood sample in order to determine the percentage of alchohol in an arrested suspect's blood was constitutional. *Id.* at 771. As in *Cupp*, no warrant had been issued before the evidence was seized, 384 U.S. at 770; 412 U.S. at 295. The *Schmerber* Court decided that the warrantless search was permissible, however, since the circumstances plainly indicated the existence of probable cause to arrest, and the police officer conducting the search "might reasonably have believed that he was confronted with an emergency in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' " *Id.* at 768, 770 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)). The Court, recognizing that the amount of alchohol in the blood begins to diminish shortly after drinking stops, concluded that "the attempt to secure evidence of blood-alchohol content in this case was an appropriate incident to petitioner's arrest." 384 U.S. at 770-71.

[193] *See supra* notes 183-84 and accompanying text.

that an exigency existed in both cases since such evidence might not have been otherwise obtained.[194] No such exigency prevailed in the instant case, however, where the evidence was of a more permanent nature.[195]

In determining the reasonableness of a search, the court is required under the fourth amendment to balance the "need to search against the invasion which the search entails."[196] While the extraction of a blood sample can be viewed simply as a mechanical process,[197] it is submitted that such an extraction represents a severe invasion for constitutional purposes.[198] Arguably, therefore, a prearrest, forced acquisition of blood should be prohibited when the need is not compelling.[199] Indeed, the prearrest search condoned by the Court of Appeals in *In re Abe A.* seems particularly improper in this nonexigent situation since the very same evidence could have been obtained after arrest pursuant to statutory authority.[200]

Michael J. Gunnison

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[194] *Cupp*, 412 U.S. at 296; *Schmerber*, 384 U.S. at 770-71; *see supra* notes 191-92.

[195] 56 N.Y.2d at 296, 437 N.E.2d at 269, 452 N.Y.S.2d at 10.

[196] Camara v. San Francisco, 387 U.S. 523, 537 (1967).

[197] *See Schmerber*, 384 U.S. at 772 (the taking of blood is a "minor [intrusion] into an individual's body"); Breithaupt v. Abram, 352 U.S. 432, 435 (1957) ("there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician"); *In re* Abe A., 81 App. Div. 2d 362, 370, 440 N.Y.S.2d 928, 932 (1st Dep't 1981) (Silverman, J., dissenting) (the extraction of a blood sample is "trivial").

[198] In *Cupp*, the Supreme Court noted the severity of a fingernail scraping, stating:

> Unlike the fingerprinting in *Davis*, the voice exemplar obtained in *United States v. Dionisio* . . . or the handwriting exemplar obtained in *United States v. Mara*, . . . the search of the respondent's fingernails went beyond mere "physical characteristics . . . constantly exposed to the public," and constituted the type of "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny.

412 U.S. at 295 (citations omitted). It is submitted that an extraction of blood is clearly more severe than a fingernail scraping.

[199] While prearrest, forced acquisition of blood should be prohibited when the need is not compelling, this is not to suggest that courts never have prearrest authority to compel production of nontestimonial evidence. *See* District Attorney v. Angelo G., 48 App. Div. 2d 576, 579, 371 N.Y.S.2d 127, 130 (2d Dep't 1975). In *Angelo G.*, for example, the court held that a warrant may issue prior to arrest in order to obtain handwriting exemplars. *Id.* at 579-80, 371 N.Y.S.2d at 130-31. In so holding, Justice Hopkins emphasized that "[t]he Fourth Amendment does not prohibit the taking of handwriting exemplars, for no search or seizure of the person is involved." *Id.* at 579, 371 N.Y.S.2d at 130. Handwriting exemplars may be obtained without unlawful intrusion into the body. *Id.*

[200] *See* CPL § 240.40 (McKinney Supp. 1982). Section 240.40 is a discovery statute which permits the taking of blood samples when an indictment, superior court information, prosecutor's information, or information is pending. *Id.* In *In re Abe A.*, the appellate divi-

Blood sample taken without defendant's consent during a prearrest investigation is inadmissible in subsequent prosecution unless taken pursuant to an authorizing court order

The United States Supreme Court has declared that the nonconsensual taking of a blood sample from a defendant, upon findings of probable cause and exigency, is constitutionally permissible.[201] This has resulted in more effective state prosecution of alcohol-related crimes,[202] since evidence of blood-alcohol content

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sion stated that in order to obtain a blood sample from a suspect, a formal charge must have been filed against him. 81 App. Div. 2d at 369, 440 N.Y.S.2d at 93. The court reasoned that "[i]f the police have probable cause to arrest, they should effect the arrest. However, if this is lacking, then the individual should be free from the intrusion which the People seek to impose upon him." *Id.* Similarly in *In re* Mackell v. Palermo, 59 Misc. 2d 760, 300 N.Y.S.2d 459 (Sup. Ct. Queens County 1969), the court, in denying an application by the District Attorney to have a suspect shave his beard for identification purposes, noted that "the rub here, and the reason compelling a denial of the District Attorney's application, is that the respondent, whose facial hair is sought to be removed, *is not a defendant in any proceeding in this county.*" *Id.* at 765, 300 N.Y.S.2d at 463 (emphasis in original); *cf.* People v. Moselle, 57 N.Y.2d 97, 109, 439 N.E.2d 1235, 1240, 454 N.Y.S.2d 292, 297 (1982) (CPL § 240.40 has preempted authorization and regulation of the taking of blood samples).

[201] Schmerber v. California, 384 U.S. 757, 770-71 (1966). In *Schmerber*, the defendant-driver was involved in an automobile accident. *Id.* at 758. The defendant was arrested after the police detected the odor of alcohol on his presence. *Id.* Subsequently, the arresting officer directed a physician to take a sample of defendant's blood, although the defendant refused, on the advice of counsel, to consent to the tests. *Id.* at 758-59. The sample ultimately revealed a blood-alcohol content (BAC) in excess of the legal intoxication level in California. *Id.* at 759. The defendant was convicted of driving an automobile under the influence of intoxicating liquor. On appeal, he argued, *inter alia*, that he was subjected to an unreasonable search and seizure in violation of the fourth amendment. *Id.* at 758-59. The Court held that the taking of a blood sample is a search and seizure covered by the fourth amendment, *id.* at 767, and stated that a warrant normally would be necessary to justify this type of bodily intrusion, *id.* at 770. The Court nevertheless held that:

> The officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence,". . . . [T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content . . . was an appropriate incident to petitioner's arrest.

Id. at 770-71; *see* P. WESTON & K. WELLS, CRIMINAL EVIDENCE FOR POLICE 174-75 (2d ed. 1976).

[202] *See, e.g.*, Delarosa v. State, 384 So.2d 876, 878 (Ala. Crim. App. 1980) (prosecutor need only introduce evidence of defendant's BAC and produce expert testimony that driver was impaired); Palmer v. State, 604 P.2d 1106, 1109 & n.6 (Alaska 1979) (statutory presumption based on BAC); People v. Meyers, 198 Colo. 295, 298, 599 P.2d 891, 892 (1979) (prosecutor need only introduce evidence of BAC and expert testimony); Commonwealth v.